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No. 96-243

SUPREME COURT OF THE UNITED STATES
October Term, 1996

BERNADINE SUITUM,

Petitioner,

- against -

TAHOE REGIONAL PLANNING AGENCY,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE CITY OF NEW YORK ON BEHALF OF RESPONDENT

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INTEREST OF AMICUS CURIAE.

The City of New York submits this brief pursuant to Rule 37.5, in support of respondent Tahoe Regional Planning Agency and in favor of affirmance of the decision of the Ninth Circuit Court of Appeals.

Land use regulations, including transferable development rights ("TDRs") are a useful tool of zoning and city planning for the City of New York ("City"). Contrary to the insinuations of petitioner's counsel (Pet. Br. at 32), the use of TDRs by the City of New York in connection with the landmarking of buildings long predates this Court's decision in Lucas v. South Carolina Coastal Council, 505 US 1003, 112 S.Ct. 2886, 2899 (1992), and by no stretch of the imagination can be deemed an attempt to subvert the holding of that 1992 decision.

Every environmental or preservation plan which employs TDRs is unique and must be evaluated on its specific facts. The plan of the respondent Tahoe Regional Planning Agency affects petitioner's unimproved parcel of real property, while the landmark properties of New York City are improved parcels. While thus far few of New York's landmark properties have availed themselves of TDRs because the vast majority do not suffer economic loss, and may even benefit, from their landmark status, TDRs do constitute part of the value of these properties and have permitted development of other parcels beyond that permitted as-of-right.

The outcome of this case is of importance for governmental entities which have used some form of transferable development rights for many years. Petitioner invites this Court to repudiate its previous cases which hold that it is economic value, not sentimental attachment to one particular piece of property, which matters, and to create a

cause of action which is not only brand new but completely outside of the line of this Court's takings cases. Such a holding would inhibit the ability of states and localities to preserve a liveable environment for all their citizens, because it would threaten to make environmental regulation prohibitively expensive. In the case of New York City, whose program is preservationist and relates to improved parcels, such a holding would limit the value of a tool which has proved helpful in assuring the preservation of landmarks.

This Court has never before recognized that a sentimental attachment to one particular piece of land, and only one potential utilization of the property on that physical plot, constitutes a viable takings claim where some economic value still attaches to that plot, and it should decline the invitation to do so here.

Transferable development rights in the City of New York.

a. Development rights: the background.

Since the first New York City Zoning Resolution ("ZR") was enacted in 1916, the ZR has limited real property owners' building rights by means of the "zoning envelope", "an imaginary three-dimensional mold representing the maximum bulk to which a building might be developed under the proposed regulations." Richards, Development Rights Transfer in New York City, 82 Yale L. J. 338, 343 (1972). In 1909 this Court had held Boston's height control regulations constitutional in Welch v. Swasey, 214 US 91 (1909).

The Zoning Resolution allocates varying degrees of development rights to all parcels of real property in the City, except for streets and parks. These development rights are stationary and may not be transferred to other parcels of land except as specified in the Zoning Resolution. Controls on

development rights are proportionate to the size of the zoning lot and appropriate to its location, based on such factors as street width, transit access, and neighborhood character. See, Marcus, Air Rights in New York City: TDR, Zoning Lot Merger and the Well-Considered Plan, 50 Brooklyn L. Rev. 867, 868-69 (1984).

The zoning lot, which is not the same as a tax lot and is defined in ZR § 12-10, is the basic unit for planning control of building height, floor area, residential density, and use. Pursuant to ZR § 12-10, the owners of one or more contiguous tax lots on a single city block may merge their properties for zoning purposes into one zoning lot, provided all lots within the merged lot record the appropriate deed restrictions. Within the merged zoning lot, the owner of one property may apply the unused development rights available to one or more other properties within the lot as-of-right, if in compliance with other provisions of the Zoning Resolution. These "development rights" are typically transferred by private contract when the merger is executed.

In these widely used transactions, which permit a high-rise building to utilize unused or unusable development rights belonging to one or more contiguous low-rise properties on a single block, one tax lot can only transfer its unused development rights[1] to another within its own merged

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[1] The total floor area permitted on a zoning lot is determined by means of the Floor Area Ratio ("FAR"), which expresses the relationship between the amount of useable floor area permitted and the area of the zoning lot on which the building is located. A permitted FAR of 10, for example, allows 50,000 square feet of usable floor area to be constructed on a 5,000 square foot lot (5,000 x 10 FAR). The FAR was devised to prevent a developer from squeezing more stories into the permitted height of the building, and New York City adopted FAR controls in 1961. Development Rights Transfer in New York City, supra, at 346.

(continued...)

zoning lot, but once the new zoning lot is created, the cumulation of development rights is as-of-right. Transferable development rights, in contrast, is a term reserved for the transfer of development rights between zoning lots under conditions specified by statute. See, Marcus, supra, at 870-871.

b. New York City's Transferable Development Rights.

Development rights from zoning lots containing buildings designated as New York City landmarks are given special statutory transfer opportunities. Pursuant to specific provisions in the New York City Zoning Resolution ("ZR"), owners of landmark buildings can transfer their unused development rights to a somewhat greater number of locations than would be permissible in a zoning lot merger. ZR §§ 74-71, 74-79.

This Court, in Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) ("Penn Central"), upheld the constitutionality of the designation as a landmark of Grand Central Terminal. In that opinion, this Court recognized TDRs as one valuable strand in the "bundle" of rights appertaining to a given property, the value of which should be considered as a beneficial economic use of the property by the court deliberating a takings challenge .

To help "mitigate whatever financial burdens" are imposed on the owner of a landmark building (Penn Central, 438 US at 137), ZR § 74-79 permits the transfer of unused development rights from lots occupied by a landmark to

[1] (...continued)

Unused development rights exist when the bulk of a building or its floor area is less than that permitted as-of-right in the zoning district in which the building is located.

adjacent lots, as that term is defined in the section.[2] The transfer of TDRs from a sending lot to a receiving lot permits the development of the latter lot beyond the limitations otherwise imposed by the Zoning Resolution.

Pursuant to § 74-79, the transfer must be authorized by a special permit granted by the New York City Planning Commission ("CPC"). The CPC must make certain findings specified in ZR § 74-792 "[a]s a condition for permitting such transfer." As in the case before this Court, the Zoning Resolution requires that the applicants for a permit for the transfer of development rights from a lot occupied by a landmark building must include a certified copy of recorded instruments which notify prospective purchasers or mortgagors of the restrictions upon further development of both the sending and the receiving lot. ZR § 74-793.

Special provisions of the Zoning Resolution permit owners of landmark properties in certain special districts to utilize their development rights on nearby parcels. In the Theater Subdistrict of the Special Midtown District, development rights of landmark theaters, including those with landmark interiors, may be transferred as specified in ZR §§ 81-212 and 81-747.

The Special South Street Seaport District, where a TDR "bank" has been established, is an example of the

[2] The Zoning Resolution also permits the transfer of landmark development rights to noncontiguous lots within specific geographic boundaries in two instances. In the Grand Central Subdistrict TDRs from a landmark, including Grand Central Terminal itself, may be transferred within the boundaries of the Subdistrict by City Planning Commission special permit. ZR § 81-63. Similarly, TDRs from the Schermerhorn Row landmark buildings in the Special South Street Seaport District may be transferred to designated receiving lots within the District. ZR § 88-04.

manner in which TDRs not only help preserve landmarks but encourage development of other parcels. A consortium of commercial banks which held mortgages on the old landmark properties released the mortgages and acquired the TDRs, which are "stored" and sold for new development as demand warrants. The TDRs may be transferred from the parcels containing the landmark properties to near-by sites. See, Marcus, supra, at 891 and 899. A 1984 evaluation of New York's TDR program found:

> The Seaport TDR plan has acted as a catalyst for development and as a lifesaver for the threatened landmarks. Freed from their crippling mortgage obligations, the historic South Street Seaport properties have attracted substantial reinvestment financing for extensive rehabilitation. The Seaport has become a major center for tourism.

Marcus, supra, at 892.

c. The value of TDRs.

TDRs are both a planning tool which mitigates the economic hardship to individual owners of property subject to regulation and a means to direct desired economic development to nearby but less historically or ecologically sensitive properties. They provide an efficient and workable compromise between the property rights of owners affected by the regulatory scheme and the needs of the community as a whole. Of critical significance, they also help maintain the value of many or all of the properties within the affected areas.

It is settled law in New York State that development rights have value which private parties may and do litigate, Newport Associates, Inc. v. Solow, 30 NY2d 263, 283 NE2d

600, cert. denied, 410 U.S. 931 (1973), and which constitute part of the economic value of parcels whose owner cannot or does not wish to utilize its full allocation of building rights on its own zoning lot.

It is also well settled that TDRs have value which should be considered in a takings challenge. St. Bartholomew's Church v. City of New York, 914 F.2d 348, 357, 359 (2d Cir. 1990), cert. denied, 499 U.S. 905 (1991) (rejecting appellant's claim that TDRs are worthless); Penn Central Transportation Co. v. City of New York, 42 NY2d 324, 336, 366 NE2d 1271 (1977), aff'd, 438 U.S. 104 (1979) ("These substitute rights are valuable, and provide significant . . . compensation for the loss of rights above the terminal itself"); In re Application of Russo v. Beckelman, 204 AD2d 160, 611 NYS2d 869 (1st Dept. 1994), lv. to appeal denied, 85 NY2d 802, 648 NE2d 792 (1995); Schubert Organization, Inc. v. Landmarks Preservation Commission, 166 AD2d 115, 570 NYS2d 504 (1st Dept.), lv. to appeal denied, 79 NY2d 751, 587 NE2d 289 (1991), cert. denied, 504 U.S. 946 (1992).

The Zoning Resolution provides a series of special provisions which allow owners of designated buildings to transfer their development rights under specified circumstances. In addition to Grand Central, South Street Seaport, and theaters in the theater subdistrict, landmark buildings whose owners have benefitted from the sale of TDRs or similar bulk-shifting provisions include Amster Yard in midtown Manhattan, the Villard Houses on Madison Avenue, the John Street Methodist Church, the India House on Hanover Square, the Old Slip Police Station, 55 Wall Street, City Center Theater, the courthouse of the Appellate Division, First Department, and Saks Fifth Avenue's flagship store. See, ZR §§ 74-711, 74-712; see also, Richards, Downtown Growth Control through Development Rights

Transfers, 21 Real Property Probate and Trust Journal 435, 462-65 (1986).

ARGUMENT

I

THIS COURT SHOULD NOT CREATE A NEW PER SE TAKINGS CAUSE OF ACTION.

This Court, in evaluating the impact of regulatory action on real property rights, has "generally eschewed any 'set formula' for determining how far is too far, preferring to 'engage in . . . essentially ad hoc, factual inquiries'". In Lucas v. South Carolina Coastal Council, 505 US 1003, 112 S.Ct. 2886 (1992), it held that "two discrete categories of regulatory action are compensable [as a taking for public use] without case-specific inquiry into the public interest advanced in support of the restraint." Lucas, 505 US at 1015. The first is regulation which requires a property owner to suffer a physical "invasion" of his property, no matter how minute the intrusion or how weighty the public purpose behind it, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 US 419 (1982).

The second category occurs when a state-enacted regulation denies a real property owner "all economically beneficial uses" of his land. 505 US at 1019 (emphasis in original). Before Lucas, this Court had frequently expressed the same concept in similar words. See, United States v. Riverside Bayview Homes, Inc., 474 US 121, 127 (1985) ("economically viable use of . . . land"); accord, Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 US 470, 495 (1987); Hodel v. Virginia Surface Mining & Recl., 452 US 264, 295-96 (1981); Agins v. City of Tiburon, 447 US 255, 260 (1960) . The common thread is the emphasis on economic or financial return from the land. "[F]or what is

the land but the profits thereof[?]" 1 E. Coke, Institutes, ch.1, § 1 (1st Am. ed. 1812) (quoted in Lucas, 505 US at 1017).

The petitioner in this case attempts to avoid the "ad hoc factual inquir[y] . . . conducted with respect to specific property and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances" which this Court had long held is required in takings cases. Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 US 264, 295 (1980). (She does not contest the legitimate state interest in the protection of Lake Tahoe or dispute that the regulations at issue rationally relate to that interest.) She disingenuously attempts to bring her facts within the recently announced Lucas exception for property which has been deprived by a governmental regulation of all economic value, although she cannot and does not allege that all economic value has been taken from her property.

The petitioner asks this Court to create a third per se takings category, which would require compensation for any regulation which prohibited the use specifically desired by the owner on any particular property. Her counsel argue that because the regulations forbid her to build a residence, which she first proposed to build seventeen years after she acquired the property, there has been a taking.

Petitioner's counsel concedes that transferable development rights allocated or allocable to her property have value (Pet. Br. at 25), although the amount has not yet been determined. The record shows that value will remain to the property even if the development rights are sold. See, Affidavits of Stephen R. Johnson dated December 4, 1993 and March 24, 1994 (pp. 123-32 and 139-43 in the Record on Appeal) in support of Defendant's Motion for Summary Judgment. Therefore, this case cannot be brought under the tent of Lucas, which rested on a state court finding

(questioned by several members of this Court) that Lucas' property had been deprived of all economic value.

Granting petitioner relief at this stage in the proceedings would require the creation of a cause of action never before recognized by this Court as a per se taking. Petitioner's counsel argue that the fact that these TDRs (and the property itself) have value is irrelevant because she cannot use the property for her first-choice use, a retirement homesite.

This Court has never held, even in dicta, that a denial of an owner's first-choice use of her property, without consideration of potential alternative uses, constitutes a taking. See, cases cited in Lucas, 505 US at 1026 n13. This Court's previous holdings on property rights have uniformly emphasized the objective and economic, rather than the subjective and physical, use of property. Implicit in this line of cases is the fact that if the present owner finds that the regulation destroys her particular interest in the property, the property will still, absent extraordinary circumstances, have "market value or resale potential" reflecting uses others may lawfully make of it. Lucas, 505 US at 1033-34 (Kennedy, J., concurring).

More specifically, this Court has never recognized a right to build as a compensable taking where other values, including the right to exclude others and to sell the property, remain to the owner. See, Nollan v. California Coastal Commission 483 US 825, 836 (1987) (the regulatory agency could have forbidden construction of the house altogether, in order to protect the public's view of the beach, without exercising a taking); Dolan v. City of Tigard, 512 US 374, ___, 114 S.Ct. 2309, 2322 (1994) (Stevens, J., dissenting) (city may deny outright building permit for business expansion because of adverse impact on drainage and traffic patterns); Penn Central. The new situation created by the

pressures of development on fragile ecological areas, and the growing understanding that heretofore permissible forms of development have adverse impacts on an entire region, means that the burden placed on state and local governments will be profound if this Court adopts a holding that a prohibition against building, of and by itself, is sufficient to establish a taking.

II

PETITIONER CLAIMS A NOVEL CAUSE OF ACTION NOT PREVIOUSLY RECOGNIZED BY OUR COURTS: THE LOSS OF A RIGHT TO BUILD ON A SPECIFIC PARCEL.

This Court has long recognized that "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law". Dolan v. City of Tigard, 512 US 374, ___, 114 S.Ct. at 2316 (1994), quoting Pennsylvania Coal Co. v. Mahon, 260 US 393, 413 (1922). Creating a new per se takings category based on a purported "right to build", regardless of the economic value remaining in the property or the fair compensation proffered for that deprivation, would open the floodgates to demands for compensation for each and every strand in the "bundle" of property rights. No barrier would be left to a situation where every land use regulation would be subject to a takings challenge from every piece of property affected. Where no property owner is required to show that she is economically damaged by the regulation, the potential claims for compensation for a regulatory "taking" are indeed limitless.

As this Court said in repudiating another petitioner's attempt to "shoehorn" its facts into the per se categories announced in Lucas, "To the extent that any portion of property is taken, that portion is always taken in its entirety;

the relevant question, however, is whether the property taken is all, or only a portion, of the parcel in question." Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust, 508 US 602, 644 (1993). Quoting Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 US 470, 497 (1987), this Court said in Concrete Pipe:

> [O]ur test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, [and] one of the critical questions is determining how to define the unit of property "whose value is to determine the denominator of the fraction".

508 US at 644. Yet, petitioner Suitum asks this Court to declare that the value that remains in the property (in her case, both the TDRs and the value of the land itself) is irrelevant to a determination that she has suffered a taking.

III

TDRS HELP TO PREVENT A FEW PROPERTY OWNERS FROM BEARING THE ENTIRE BURDEN OF A REGULATORY SCHEME WHICH BENEFITS THE ENTIRE COMMUNITY, AND THIS COURT SHOULD ENCOURAGE THEIR USE.

It is axiomatic that a few individual properties should not be made to bear "public burdens which, in all fairness and justice, should be borne by the public as a whole". Dolan, supra, quoting Armstrong v. United States, 364 US 40, 49 (1960). However, the relief sought by petitioner would so expand the definition of "compensable taking" as to throw the previously settled law, and the many regulatory schemes designed in reliance on that law, particularly those

intended to preserve the natural environment, into uncertainty and encourage endless litigation.

The creation of a new per se takings category would drastically limit any government's ability to preserve or restore environmental values by making the cost of such regulation, in compensation for taking of property, prohibitively expensive, or so uncertain that the regulatory agency dare not act because its potential liability is literally incalculable. Each regulatory takings challenge should be evaluated on its facts, as this Court has previously held; statutory schemes like New York City's landmark program, which not only leave existing property values untouched but give landmark owners valuable additional rights to develop other parcels, should not be subjected to a per se rule which ignores such values and rights.

IV

THIS COURT SHOULD NOT ABANDON ITS PREVIOUS HOLDINGS THAT IT IS THE ECONOMIC VALUE OF THE LAND, NOT A NATURAL RIGHT TO BUILD, WHICH IS THE ESSENCE OF REAL PROPERTY EXPECTATIONS.

Implicit in petitioner's argument is the contention that the property she wishes to build on has a unique, intrinsic value to her for which any economic return is irrelevant. This assertion, however, is completely out of line with this Court's holding on valuation in just compensation cases.

> In view, however, of the liability of all property owners to condemnation for the common good, loss to the owner of nontransferable values deriving from his unique need for the property or idiosyncratic attachment to it, like loss due to an exercise of

> the police power, is properly treated as part of the burden of common citizenship.

Kimball Laundry Co. v. United States, 338 US 1, 5 (1949), quoted in United States v. 564.54 Acres of Land, 441 US 506, 512 (1979) (emphasis added).

At issue in this case are two incompatible conceptions of real property: is it a physical thing, which is "useless" if an owner's personal expectations are frustrated, or is it the value which may be realized from a number of potential uses? Petitioner would have this Court disregard the value of the TDRs allotted to her land and enshrine a concept of property not heretofore judicially recognized: that any governmental interference with any strand in the "bundle" of legal rights which comprise private property is a compensable taking.

Where, as here, substantial economic value continues to inhere in the property after the challenged regulation has limited its potential use, this Court should not find a compensable taking in the mere denial of a right to build on one specific parcel. The value inhering in the right to build, although nothing can be built on Mrs. Suitum's piece of land, remains to her. She could use the rights herself on another piece of less environmentally sensitive land; she could sell the rights to another; or she could sell the land itself, with or without the TDRs attached. As the Second Circuit Court of Appeals has stated, the key question is whether other persons "might be interested in purchasing all or part of the land" for permitted uses. Park Avenue Tower Associates v. City of New York, 746 F.2d 135 (2d Cir. 1984), cert. denied sub nom. Eastco v. City of New York, 470 US 1087 (1985); Pompa Constr. Corp. v. Saratoga Springs, 706 F.2d 418, 424 (2d Cir. 1983).

Property is not a thing, but the sum of interests that the law recognizes and protects ("a bundle of rights"). This Court has recognized in the past that "Where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety." Andrus v. Allard, 444 US 51, 65-66 (1979).

As this Court acknowledged in Lucas, 112 S. Ct. at 2894, it is a "relatively rare situation[] where the government has deprived a landowner of all economically beneficial uses." The same piece of property has a variety of potential uses, and each successive owner may have different reasons for acquiring it. However, if this Court should expand the Lucas rule to cover every parcel upon which the physical erection of a structure may be prohibited, without taking into consideration the value of other rights in the bundle appertaining to a particular property, the situation will not be rare at all,[3] but universal. It will adversely affect all regulatory schemes which rely on TDRs as a means of distributing the benefits and burdens of needed environmental and preservationist restrictions among property owners, and will severely limit the ability of cities and localities to use what has proven to be a useful tool in the City's landmark program.

In conclusion, whether or not the respondent TRPA has gone "too far" in regulating Mrs. Suitum's property is a factual question which cannot be determined without considering the value of her TDRs and the sale value of her

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[3] If the Court intends to unbundle property interests, and look at them individually, it will no longer be so rare or hard to find a taking.

Federman, *Lucas v. South Carolina Coastal Council*: An Antiquated Response to a Modern Problem, 57 Albany L. Rev. 213, 222 (1993).

property to a willing buyer. The creation of a new per se takings category would have a chilling effect on necessary environmental regulation, and should be avoided.

Respectfully submitted,

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January 9, 1996

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